Supreme Court, U.S.
FILED

95 1009 DEC 22 1995

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MILFORD C. HORTON,

Petitioner,

v.

MONROE SYSTEMS FOR BUSINESS, INC., GERALD NEUMANN, MARVIN PASTOR, GERALD TULLY, MICHAEL GARDNER, HAROLD SHORT, and JOHN MISKEW,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does time to file appeal run from denial of a timely post-judgment motion, even where the post-judgment motion is partially repetitive of an earlier pre-judgment motion?

PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINIONS BELOW

The Court of Appeals' decision sought to be reviewed appears in the Appendix. The Court of Appeals' Order Denying Petitioner's Petition for Rehearing also appears in the Appendix, along with those Orders of the District Court which are relevant to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Fifth Circuit was entered September 13, 1995. The Court of Appeals denied Petitioner's timely Petition for Panel Rehearing on October 25, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

FEDERAL RULES INVOLVED

Rule (4)(a) of the Federal Rules of Appellate Procedure ("Rule 4(a)"):

> *"Appeal in a Civil Case"*
>
> (1) Except as provided in paragraph (a)(4) of this Rule, in a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment. . . .

* * *

(4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:

* * *

(C) to alter or amend the judgment under Rule 59;

Rule 59(e) of the Federal Rules of Civil Procedure ("Rule 59"):

* * *

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

This case arises out of an employment discrimination lawsuit. Petitioner and several other over-forty-year-old employees of Respondent were "laid off" and were replaced with much younger workers, despite the claim of Respondents that the Company had reduced its work-force due to financial pressure.

This Petition seeks review of the Court of Appeals' dismissal of Petitioner's Appeal. The pertinent dates (all 1995) are:

January 4	Order Granting Summary Judgment
January 13	Motion to Reconsider (the **"Pre-Judgment Motion"**)
February 21	Entry of Denial of the Pre-Judgment Motion
February 21	Judgment entered
February 24	Petitioner's Rule 59 Motion (the **"Post-Judgment Motion"**)
February 28	Entry of Denial of Post-Judgment Motion
March 28	Notice of Appeal filed in District Court

Respondent Monroe moved to dismiss the appeal, believing that the Post-Judgment Motion somehow lost its force because a Pre-Judgment Motion had once been filed. The Court of Appeals dismissed the appeal.

EXISTENCE OF JURISDICTION BELOW

The District Court had federal jurisdiction pursuant to 28 U.S.C. § 1331 as a result of the questions of federal law presented by Petitioner's claims under 29 U.S.C. § 621, *et seq.*, 42 U.S.C. § 12101 *et seq.*, and pendant jurisdiction over state law claims.

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant certiorari in this case because the decision of the Court of Appeals conflicts with the decisions of this Court and another Court

of Appeals by holding that Petitioner's Post-Judgment Motion did not toll the time for appeal. The Court of Appeals' decision in this case, which holds that a post-judgment motion to alter or amend the judgment filed within ten (10) days after entry of judgment **will not** toll the time for appeal where a similar pre-judgment motion had been filed and ruled upon prior to judgment, is in tension with this Court's decision in ***United States v. Ibarra***, ___ U.S. ___, 112 S.Ct. 4, 6-7 (1991), and with the holding in ***United States v. Indrelunas***, 411 U.S. 216, 217 (1973).

The Court of Appeals' decision also directly conflicts with ***Zazu Designs v. L'Oreal, S.A.***, 979 F.2d 499, 502 (7th Cir. 1992).

A proper determination of whether a post-judgment motion is a Rule 59(e) motion and, therefore, tolls the time for appeal is imperative to the preservation of rights in the District Courts and Courts of Appeals. A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals may turn on whether the Court of Appeals considers a motion filed within ten (10) days of the judgment to be one which tolls the time for appeal under Rule 4(a)(4). Appellate deadlines should be "bright lines," and should turn on the literal application of the rules to avoid injustice.

1. The Appellate Deadlines Never Run Until After a Rule 58 Judgment is Entered

In ***Indrelunas***, this Court, in a per curiam opinion, held that the time to appeal does not begin to run until a separate document, a Rule 58 judgment, is entered.

United States v. Indrelunas, 411 U.S. 216, 217 (1973). By dismissing Petitioner's appeal, the Court of Appeals has mandated that the denial of a **pre-judgment** motion triggered the time for appeal. The denial of the Pre-Judgment Motion took place prior to the entry of judgment, albeit on the same day. This is inconsistent with this Court's rule that no appellate deadline will begin to run until **entry of a Rule 58 judgment**. *See* ***Indrelunas***, 411 U.S. at 217. Petitioner's appellate deadline could not have begun to run until entry of the judgment, and the filing of a post-judgment motion tolled the time for appeal under Rule 4(a).

2. A Pre-Judgment Motion Cannot "Use Up" the Right to File a Rule 59 Motion

By dismissing Petitioner's appeal, the Court of Appeals has mandated that the Pre-Judgment Motion somehow "used up" Petitioner's ability to file a Rule 59 motion following the entry of judgment. In addition to this "rule" being absent from the Federal Rules of Appellate Procedure, this new rule is inconsistent with this Court's holding in ***United States v. Ibarra***, ___ U.S. ___, ___, 112 S. Ct. 4, 6-7 (1991). In ***Ibarra***, this Court held that it is irrelevant that the post-judgment motion revisits issues previously ruled upon by the court. So long as it is filed within ten (10) days of the entry of judgment, it still qualifies as one of those motions which "tolls" the time for appeal under Rule 4(a). *Id.* **"Without a clear general rule litigants would be required to guess at their peril the date on which the time to appeal commences to**

run." *United States v. Ibarra*, ___ U.S. ___, ___, 112 S. Ct. 4, 6 (1991).

Under these Supreme Court cases, Petitioner's Post-Judgment Motion, which was the only motion filed and ruled-upon post-judgment, tolled the time for appeal. (It should be noted that Petitioner's Post-Judgment Motion was **not** identical to his Pre-Judgment Motion.) This Post-Judgment Motion was denied and the denial was entered on the docket February 28, 1995. Therefore, Petitioner's Notice of Appeal, filed on March 28, 1995, only twenty-nine (29) days after the denial of the Post-Judgment Motion, was timely.

3. The Seventh Circuit Has Found Jurisdiction For an Appeal On These Facts

The Fifth Circuit's decision in this case also squarely conflicts with the factually identical decision of the Seventh Circuit in ***Zazu Designs v. L'Oreal, S.A.***, 979 F.2d 499, 502 (7th Cir. 1992) (Easterbrook, J.). In ***Zazu***, L'Oreal made a motion under Rule 52(b) (Federal Rules of Civil Procedure) for an additional hearing following the filing of the opinion of the court, *but before the entry of judgment.* ***Zazu***, 979 F.2d at 502. This motion was denied by the court, and judgment was entered. Within ten (10) days, L'Oreal filed an "all-but-identical" motion. *Id.* Two years later, the court agreed to hear additional evidence, and modified its findings, but *did not modify its judgment. Id.* L'Oreal appealed. On the issue of appellate jurisdiction, Judge Easterbrook, joined by Judges Posner and Cudahy on this issue, noted:

> **[T]he parties have ignored a potential problem: a second post-trial motion does not extend the time for appeal. [citation omitted] But because**

> **only one of these motions was filed after the judgment, it suspended the judgment's finality and makes the appeal timely, even though the denial of the first motion shows that the duplicate was unlikely to succeed.** ***United States v. Ibarra***, ___ U.S. ___, ___, 112 S. Ct. 4, 6-7 (1991).

Zazu, 979 F.2d at 502 (underlining added).

Like the Seventh Circuit, but unlike the Fifth Circuit in this case, Moore's Federal Practice recognizes the difference between

Judgment Entered/POST-Judgment Motion/
POST-Judgment Motion

and

PRE-Judgment Motion/Judgment Entered/
POST-Judgment Motion

Specifically, the treatise uses a "*But cf.*" signal to separate the ***Zazu*** fact pattern of one pre- and one post-judgment motion from the more common scenario in which there are two post-judgment motions. *See* MOORE'S FEDERAL PRACTICE ¶ 204.12[1], at 4-95-96 n.63 (1994); *see id.* at ¶ 204.12[1] (1994-95 Supp. at p. 245) (again separating the two fact patterns with "*But cf.*"). As the Supplement puts it, "[s]ince the defendant's second motion was the only one filed after entry of judgment, it suspended the time to appeal even though the denial of the first motion showed that the duplicate was unlikely to succeed." *Id.*

Therefore, Petitioner's Post-Judgment Motion, being the only motion filed after judgment, tolled the time for appeal.

4. Any Rule 59 Motion Filed Within 10 Days of the Entry of Judgment Tolls the Time for Appeal

In its Motion to Dismiss, Respondent cited case law holding that if a *post-judgment motion* is filed and denied, a *subsequent post-judgment motion* urging reconsideration of that denial will not further toll the time for appeal. *See, e.g.*, ***Brown v. United Ins. Co. of America***, 807 F.2d 1239, 1242 (5th Cir. 1987) (per curiam). This Court has never endorsed the view that successive post-judgment motions ought to be ignored. In a footnote in ***Ibarra***, the Court expressly left that question open:

> **[O]nly a single motion for reconsideration was filed. We thus also have no occasion to consider whether it is appropriate to refuse to extend the time to appeal in cases in which successive motions for reconsideration are submitted. *See United States v. Marsh*, 700 F.2d 1322 (CA10 1983).**

United States v. Ibarra, ___ U.S. ___, ___, 112 S. Ct. 4, 7 n.3 (1991). In any event, this line of authority is inapplicable to, and does not address the issue in, this case for two reasons.

a. Petitioner's Rule 59 Motion Was Not the Type of Post-Judgment Motion Ignored By the Courts in the Case Law

The reasoning behind the general rule of ***Brown*** and its progeny is that a motion *seeking reconsideration of the order denying the Rule 59(e) motion* will not further toll the time for appeal:

> **A motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal. *If the motion is denied the finality of judgment is reestablished;* and the policy underlying finality precludes the court from entertaining a motion to reconsider that denial, where the reconsideration motion is served later than 10 days after entry of the [original] judgment.**

Brown v. United Ins. Co. of America, 807 F.2d 1239, 1242 (5th Cir. 1987), *citing* 6A MOORE'S FEDERAL PRACTICE ¶ 59.13[4] (underlining added; italics in original).

Petitioner's Post-Judgment Motion *did not* merely seek reconsideration of the denial of his Pre-Judgment Motion; it sought reconsideration of the entry of judgment. Therefore, his Post-Judgment Motion, having been filed within ten (10) days of the entry of judgment, **was** a Rule 59 motion, and it tolled the time for appeal under Rule 4(a)(4).

This crucial difference between the operative effect of a mere motion to reconsider a denial of a Rule 59 motion and a Rule 59 motion attacking the judgment was expressly recognized by the Court of Appeals in ***Wansor v. George Hantscho Co., Inc.***, 570 F.2d 1202 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978). In ***Wansor***, judgment was entered March 20, 1975, and Wansor filed several Rule 59 motions on March 28, 1975. These motions were denied on June 4, 1975, and Wansor filed a motion to reconsider *the denial of the March 28, 1975 motions.* While this second post-judgment motion directed only to the denial of the initial motions would not ordinarily toll the time for

appeal, the Court of Appeals in this case affirmed the panel decision to allow an exception. Pertinent to our question, however, the Court noted:

> **A motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal. [FN5] If this were a motion to reconsider the original judgment, it would function as a motion for new trial or judgment notwithstanding the verdict, and would toll the running of the period for appeal if timely filed – within 10 days after the judgment.**

Wansor, 570 F.2d at 1206, and n.5 (underlining added).

Petitioner's Rule 59(e) motion was **not**, therefore, the type of motion attacked by the courts in these cases, and **did** operate to toll the time for appeal under Rule 4(a)(4).

b. Petitioner's Timely Post-Judgment Motion Tolled the Time for Appeal

Second, Moore's Federal Practice, *Brown, Wansor,* and *Durango Assocs. v. Reflange, Inc.*, 912 F.2d 1423 (Fed. Cir. 1990), each impliedly holds that if a second post-judgment motion is filed and served within ten (10) days of the entry of judgment, it tolls the time for appeal.

See Brown:

> **A motion to alter or amend a judgment under Rule 59(e) that is served not later than 10 days after entry of judgment destroys the finality of the judgment for purposes of appeal. *If the motion is denied the finality of judgment is reestablished;* and the policy underlying finality precludes the court from entertaining a**

> **motion to reconsider that denial, where the reconsideration motion is served later than 10 days after entry of the [original] judgment.**

Brown v. United Ins. Co. of America, 807 F.2d 1239, 1242 (5th Cir. 1987), *citing* 6A MOORE'S FEDERAL PRACTICE ¶ 59.13[4] (underlining added; italics in original).

See also ***Wansor***:

> **A motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4(a) does not again terminate the running of the time for appeal. [FN5] If this were a motion to reconsider the original judgment, it would function as a motion for new trial or judgment notwithstanding the verdict, and would toll the running of the period for appeal if timely filed – within 10 days after the judgment.**

Wansor v. George Hantscho Co., Inc., 570 F.2d 1202, 1206 n.5 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978) (underlining added).

And *see* Moore's Federal Practice discussing *Durango*:

> **It has uniformly been held that a second post-judgment motion of the type which would toll the appeal period under Fed. R. App. P. 4(a)(4), not filed within 10 days after entry of a judgment, does not toll the appeal period a second time. Since plaintiff's second Rule 59(e) motion was not filed within 10 days after entry of judgment for the defendants, it did not toll the appeal period.**

MOORE'S FEDERAL PRACTICE, ¶ 204.12[1] (1994-95 Supp. at p. 245) (discussing ***Durango Assocs. v. Reflange, Inc.***, 912 F.2d 1423 (Fed. Cir. 1990)).

Again, this case law expressly holds that a motion attacking the judgment ("post-judgment motion of the type which would toll the appeal period") which is filed within ten (10) days of the entry of judgment, as Petitioner's was, **tolls the time for appeal**. In other words, because Petitioner's Post-Judgment Motion 1) attacked the entry of judgment, and 2) was filed within ten (10) days of the entry of judgment, it was a Rule 59(e) motion, and, under Rule 4(a), tolled the time for appeal.

As shown by the Court of Appeals' result in this case, and the Seventh Circuit opinion in ***Zazu***, there is a growing division among the Courts of Appeals regarding the proper application of Rule 4(a)(4) to post-judgment motions.

CONCLUSION

The Petition should be granted. The Court may wish to consider summary disposition because this result conflicts with ***United States v. Ibarra***.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10287

MILFORD C. HORTON,

Plaintiff-Appellant,

versus

MONROE SYSTEMS FOR
BUSINESS, INC., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas

(Filed Sept. 13, 1995)

Before GARWOOD, STEWART and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellee, Monroe Systems for Business, Inc., to dismiss the appeal is GRANTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10287

MILFORD C. HORTON

Plaintiff - Appellant

v.

MONROE SYSTEMS FOR BUSINESS, INC;
GERALD NEUMANN; MARVIN PASTOR;
GERALD TULLY; MICHAEL GARDNER;
HAROLD SHORT; JOHN MISKEW

Defendants - Appellees

MILFORD C. HORTON

Plaintiff - Appellant

v.

MONROE SYSTEMS FOR BUSINESS, INC;
GERALD NEUMANN; MARVIN PASTOR;
GERALD TULLY; MICHAEL GARDNER;
HAROLD SHORT; JOHN MISKEW

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed October 25, 1995)

Before GARWOOD, STEWART and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Garwood
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MILFORD C. HORTON	)	
VS.	)	3-93-CV-1900-AH
MONROE SYSTEMS FOR BUSINESS, INC.	)	(Filed Febr. 15, 1995)

ORDER

On this date came on to be considered Plaintiff's Motion to Reconsider Order of Summary Judgment filed on January 13, 1995, and having reviewed the same, the court finds and orders as follows:

In his motion for reconsideration Plaintiff suggests that the court erred in describing the burden he had as the opponent to the motion for summary judgment (See Plaintiff's motion for reconsideration at page 2). The statement quoted from the court's order is lifted out of context. The quoted statement comes from a paragraph which describes the burden of proof which a plaintiff must discharge in a discrimination suit in which non-discriminatory reasons are articulated by a defendant employer (See Memorandum Opinion and Order, filed January 4, 1995 at page 3). However, in describing Horton's burden to defeat the motion, the opinion clearly notes that he submitted deposition excerpts and affidavits to "demonstrate the existence of an issue of fact on the presence of age animus" (Id. pages 4-5) and concluded that "Plaintiff has failed to show that a genuine issue of fact exists as to whether he was terminated on the basis of his age" (Id. page 6).

Plaintiff's claim that Bud Ward's deposition provides evidence of direct age animus against him (Plaintiff's motion for reconsideration at pages 3-4) relies on a gross distortion of the contents of Ward's deposition excerpts (See Exhibit G to Plaintiff's response filed on December 13, 1994). The partial quotation cited in his motion for reconsideration conveys the clear impression that remarks of Mr. Paster were directed toward Plaintiff. To the contrary, the excerpt reflects that the only person to whom Paster referred was Virgil Jones (Exhibit G, supra, at pages 58-59). Plaintiff's reliance on *E.E.O.C. v. Mansville Sales Corp.*, 27 F.3rd 1089-1094 (5th Cir. 1994) – cited for the first time in his motion for reconsideration – to show that Virgil Jones's testimony is evidence sufficient to create a genuine issue of fact is misplaced. In *Mansville* the district court excluded all age-related statements made by the plaintiff's supervisor over a four year period, while Mr. Jones' proffered testimony relates to a single statement made by a Mr. Short at least four years prior to Plaintiff's termination (See Exhibit I to Plaintiff's response filed on December 13, 1994, at ¶10; Memorandum Opinion and Order at page 5).

Horton also claims that the court erred in failing to consider his statistical data (See motion for reconsideration at pages 5-6; see also Plaintiff's response filed on December 13, 1994, Exhibits D and F).[1] This statistical

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[1] In his motion for reconsideration Plaintiff seeks to present additional evidence (See motion at page 6, Exhibits 3, 4 and 5). Plaintiff did not seek an extension of time to respond to Defendant's motion and has submitted these data only after the court entered its order in Defendant's favor. Accordingly, these additional materials were not timely filed and need not be considered for the first time in ruling on Plaintiff's motion of reconsideration.

information is not relevant to the issues in Plaintiff's case. Specifically, although the subsequent hirees were under the age of 40 at the time of employment, Plaintiff has failed to present evidence either that applications of persons over 40 were rejected or that persons over the age of 40 who did apply were equally qualified with those who were selected for employment.

Plaintiff's argument in support of his ADA claim merely reiterates his previously rejected argument. As with his "edited" version of Mr. Ward's deposition testimony, supra, he also misstates the testimony of Mr. Neumann (See Plaintiff's response filed December 13, 1994, Exhibit A at page 45). Likewise, Plaintiff's motion for reconsideration adds nothing to his worker's compensation retaliation claim argument which was previously rejected.

The final part of Plaintiff's motion seeks to present additional evidence of pretext. A review of Plaintiff's response filed on December 13, 1994, reflects that none of the factual contentions raised in Horton's motion for reconsideration was presented in his response. Moreover, the vast majority of the supporting exhibits are presented for the first time in his motion for reconsideration, e.g., Exhibit 10 – excerpts from deposition of Robert A. Wilkins taken on December 13, 1994; Exhibit 1 – excerpts from deposition of Gerald Neumann;[2] Exhibit 6 – Plaintiff's affidavit executed on January 9, 1995; and Exhibit 7).

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[2] Excerpts from Neumann's deposition were included with Plaintiff's response filed on December 13, 1994 (See Exhibit A). However, none of the excerpts cited in Horton's motion for reconsideration was included in Exhibit A.

Prior to filing his response on December 13, 1994, Plaintiff did not file a motion under Rule 56(f) or seek an extension of time within which to respond.[3] Plaintiff's additional arguments and additional exhibits have not been timely presented. To permit a party to await a court order on a case dispositive motion and thereafter assert new grounds following an unfavorable ruling would not only abuse scarce judicial resources and prejudice the interests of the party opponent, but also would undermine the efficacy of Rule 56. Accordingly, finding that Plaintiff's additional argument and evidence have not been timely presented, Horton's motion for reconsideration on these grounds will be denied.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Reconsider filed on January 13, 1995, is denied.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 15th day of February, 1995.

/s/ William F. Sanderson, Jr.
UNITED STATES
MAGISTRATE JUDGE

---

[3] Plaintiff did suggest that policy manuals, not previously produced, might be relevant to his state law breach of contract claim (See Plaintiff's response at pages 22-23). For the reasons noted in the court's memorandum opinion filed on January 4, 1995, such manuals were irrelevant as a matter of law (Opinion at page 9). Plaintiff has not sought reconsideration on this aspect of the court's order.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MILFORD C. HORTON	)	
VS.	)	3-93-CV-1900-AH
MONROE SYSTEMS FOR BUSINESS, INC.	)	(Filed Febr. 15, 1995)

JUDGMENT

The court having considered Defendants' Motion for Summary Judgment, Defendants' Memorandum of Authorities in Support of Its Motion for Summary Judgment and Plaintiff's Response thereto finds that Defendants' motion is well taken and pursuant to the court's memorandum opinion and order filed on January 4, 1995,

It is ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is granted in its entirety and Plaintiff's claims in this suit are dismissed in their entirety with prejudice.

IT IS FURTHER ORDERED that Defendants shall recover their costs of court and Defendants are directed to file a Bill of Costs within ten days of the date of this judgment.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 15th day of February, 1995.

/s/ William F. Sanderson, Jr.
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MILFORD C. HORTON	)	
	)	3-93-CV-1900-AH
VS.	)	
	)	(Filed
MONROE SYSTEMS FOR BUSINESS, INC. ET AL	)	Febr. 27, 1995)
	)	
	)	

ORDER

On this date came on for consideration Plaintiff's Renewal of His Motion to Reconsider Order of Summary Judgment, Plaintiff's Supplemental Motion to Reconsider Objection to Defendants' Untimely Response and Plaintiff's Correction of Record filed February 24, 1995, and

IT IS ORDERED that Plaintiff's motion is in all things denied.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 27th day of February, 1995.

/s/ William F. Sanderson, Jr.
UNITED STATES
MAGISTRATE JUDGE

Supreme Court, U. S.
F I L E D
JAN 25 1996
CLERK

No. 95-1009

In The

Supreme Court of the United States

October Term, 1995

MILFORD C. HORTON,

Petitioner,

vs.

MONROE SYSTEMS FOR BUSINESS, INC., GERALD NEUMANN, MARVIN PASTOR, GERALD TULLY, MICHAEL GARDNER, HAROLD SHORT and JOHN MISKEW,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

Does a second Rule 59, Federal Rules of Civil Procedure, Motion further stay the time for appeal under Rule 4, Federal Rules of Appellate Procedure?

RULE 29.b DISCLOSURE

Monroe Systems for Business, Inc. is a privately-owned corporation and has neither a parent corporation nor any subsidiary corporations.

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STATEMENT OF THE CASE

Respondents do not disagree with Petitioner's Statement of the Case except they would specifically note that Petitioner's attempted characterizations of his two successive Motions is misleading. The first Motion filed on January 13, 1995, was styled "Plaintiff's Motion to Reconsider Order of Summary Judgment." The second Motion was styled "Plaintiff's Renewal of His Motion to Reconsider Order of Summary Judgment." Petitioner attempts to characterize only the second (post judgment) Motion as a Rule 59 Motion.[1] As discussed below, the *first* (pre-judgment) Motion *was* a timely served and filed Rule 59 Motion. The second Motion simply reurgued the grounds advanced in the first Motion and its filing did not further stay the time for appeal.

REASONS FOR DENYING THE WRIT

Petitioner asserts that the decision below is "in tension with" prior decisions of this Court and conflicts with a decision of the Court of Appeals for the Seventh Circuit (Petition pp. 3-4). The petition should be denied because there is *no* conflict with any decision of this Court and Petitioner's argument starts from a uniformly rejected premise. Further, the asserted conflict with the decision of the Seventh Circuit is on an issue that is narrowly confined, has not been adequately addressed in the circuit courts and is not sufficiently developed among the circuits to warrant this Court's intervention. *See, e.g., Beaulieu v. United States*, 497 U.S. 1039 (1990) (Justice White, dissenting from denial of certiorari) (conflict should be "sufficiently crystallized" before considered); *McCray v. New York*, 461 U.S. 961 (1983). Finally, as discussed more fully below, the analysis of the Seventh Circuit does not square with the history, purpose and wording of Rule 59 and Rule 4, Fed. R. App. P.

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1. Rule 59, Federal Rules of Civil Procedure, hereinafter "Rule 59."

I.

THE ASSERTED TENSION WITH THIS COURT'S DECISIONS IN *IBARRA* AND *INDRELUNAS* (PETITION PP. 4-6, POINTS 1 AND 2).

Contrary to Petitioner's argument and characterization (Petition pp. 4-5), the decision below is not inconsistent with *Indrelunas*. In this case, the Rule 58, Fed. R. Civ. P., judgment *was* separately entered on the docket on February 15, 1995. On the same day a separate order denying Petitioner's first Rule 59 Motion was also entered. Since the judgment was separately entered and the Motion denied, the time for appeal was triggered. *See, e.g., Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989); *American Security Bank, N.A. v. Jim Y. Harrison Realty*, 670 F.2d 317, 320-21 (D.C. Cir. 1982).[2] No inconsistency exists and the decision below is *consistent* with the decisions of the other courts of appeal.

As noted in 6A MOORE'S FEDERAL PRACTICE ¶ 59.09[1] at note 17 (p. 59-221):

> Rule 56 of the April 1937 Draft (counterpart of Federal Rule 59) read: "A motion for a new trial shall be served *within* ten days after the entry of judgment. . . ." The Final Report struck out "within" and substituted in lieu

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2. The Petitioner's claim that the Motion was denied before the judgment was entered is based on the district court clerk first entering the Motion denial order on the docket sheet. What is clear is that the district court considered and denied the Motion *and* entered judgment, so no question as to intent exists and the time for appeal was triggered. *See, e.g. American Security Bank* (in such case there is no tolling effect to the Motion). *See generally*, 9 JAMES MOORE, MOORE'S FEDERAL PRACTICE ¶ 204.12[4] (2d ed.) (MOORE'S FEDERAL PRACTICE) and cases cited, notes 3-6.

> thereof the words "not later than" so that there would be no implication that the motion for new trial could not be made until after entry of judgment.

The courts of appeal which have addressed the wording of Rule 59 agree uniformly that a timely and proper Motion can be served and filed pre-judgment. This is what occurred in this case. *See, e.g., Dunn v. Truck World, Inc.*, 929 F.2d 311, 312-13 (7th Cir. 1991); *Jurgens v. McKasy*, 905 F.2d 382, 385-86 (Fed. Cir. 1990) (and cases cited); *Hilst v. Bowen, supra*; *Greater Houston Chap., A.C.L.U. v. Eckels*, 755 F.2d 426, 427-28 (5th Cir. 1985); *American Security Bank, supra.*

Petitioner proceeds to argue that a pre-judgment Motion is to be ignored and to give it effect is inconsistent with *Ibarra* (Petition pp. 5-6). However, Petitioner subsequently acknowledges (*id.* at 8) that the two motion issue was expressly noted by the Court in *Ibarra* as not being before it. 112 S.Ct. at 7 n.3.[3] Aside from this Court's express reservation of the issue, the decision below is not contrary to *Ibarra's* rationale, once it is recognized that a proper and timely filing of a Rule 59 Motion *pre-judgment* can occur. The commentators and courts of appeal which have addressed the issue, as discussed above, have uniformly so held. Indeed, as this Court has held, even a notice of appeal can be filed before a final judgment is entered and, under Rule 4(a)(2), Fed. R. App. P., becomes effective when the Rule 58 judgment is entered. *Firstier Mortg. Co. v. Investors Mortg. Co.*, 111 S. Ct. 648 (1991). In sum, the decision below is neither inconsistent with nor "in tension" with this Court's decisions.

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3. *Ibarra* was a criminal case. In the footnote reserving the issue, the Court cited the Tenth Circuit's opinion in *United States v. Marsh*, 700 F.2d 1322, 1324 (10th Cir. 1983), which held a second filed motion for rehearing did not further extend the time for appeal.

II.

PETITIONER'S RELIANCE ON THE ASSERTED CONFLICT WITH *ZAZU DESIGNS* (PETITION PP. 6-7, POINT 3).

The issue presented is whether the second Rule 59 Motion *further* extends the time for appeal. In this case, the first (pre-judgment) Motion was denied and judgment entered on February 15, 1995. The notice of appeal was not filed until March 28, 1995, more than thirty days later and was untimely. *See, e.g., American Security Bank, supra* (where motion denied and judgment entered on same day, there is no tolling of the time for appeal under Rule 4, Fed. R. App. P.). To avoid this consequence, Petitioner relies upon his second filed Motion and seeks to measure the time for appeal from the date of its denial. In support, Petitioner relies upon the Seventh Circuit's decision in *Zazu Designs* and its treatment in MOORE'S FEDERAL PRACTICE.

A review of *Zazu Designs* reveals that the issue of the timeliness and effectiveness of the first motion was not considered. The opinion lacks any analysis or reasoning setting forth the basis upon which the expressed conclusionary rationale was justified. Indeed, its citation (979 F.2d at 502) to this Court's opinion in *Ibarra* clearly demonstrates that it failed to address or consider the fact that the first filed Rule 59 Motion was a timely and proper motion. *Zazu Designs* is also clearly wrong in concluding that a pre-judgment motion can be ignored. Rule 59 dictates otherwise, as the uniform decisions of the courts of appeal, set forth above, clearly demonstrate.

Petitioner's further argument that the "but cf" citation to *Zazu Designs* by MOORE'S FEDERAL PRACTICE (Petition pp. 6-7) demonstrates that a pre-judgment/post-judgment situation is different from that involving two post-judgment motions, simply is incorrect. On the contrary, in the context used in MOORE'S

FEDERAL PRACTICE, the citation demonstrates that *Zazu Designs* is out of step with the other cases cited. As the decisions of the courts of appeal set forth below demonstrate, a second Rule 59 Motion does not further extend the time for appeal.

III.

PETITIONER'S CLAIM THAT MULTIPLE MOTIONS WITHIN 10 DAYS OF JUDGMENT ARE PROPER (PETITION PP. 8-12, POINT 4).

Petitioner argues that his second Motion was not a motion to reconsider the denial of the first filed Motion. Accepting this as true does not detract from the fact that a second served and filed motion for reconsideration of the underlying decision and judgment does *not* further extend the time for appeal.[4] *See, e.g., Murrary v. District of Columbia*, 52 F.3d 353, 356 (D.C. Cir. 1995); *Charles L.M. v. Northeast I.S.D.*, 884 F.2d 869, 870 (5th Cir. 1989); *American Security Bank, supra; EEOC v. Central Mtr. Lines, Inc.*, 537 F.2d 1162, 1165 (4th Cir. 1976). *See also*, 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] and cases cited, pages 4-95-96, n.63.

Petitioner, in short, seeks to have this Court declare that two or more Rule 59 Motions, seeking to alter the judgment, if served and filed "within" ten days of the judgment's entry, operate to stay the time for appeal until the last such Motion is decided.[5]

---

4. Indeed, the characterization of the second Motion as seeking reconsideration of the denial of the first Motion simply involves the style of the second Motion. The purpose of the second Motion is to have the court again "rethink" the asserted error in its *judgment* which was allegedly overlooked when the first Motion was denied. The second Motion still clearly relates to the asserted error in the underlying judgment.

5. Petitioner concedes that a second post-judgment Rule 59 Motion filed more than ten days after entry of judgment does not operate to stay the time for appeal (*e.g.* Petition, pp. 10-12).

This argument simply ignores the fact that "only by an *original* motion of the type specified . . ." is the time for appeal under Rule 4, Fed. R. App. P., stayed. 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] at page 4-95.

Equally to the point, Petitioner's rationale does not comport with the aim of finality and certainty espoused in the Rules. *See, e.g., Browder v. Director, Ill. Dep't of Corrections*, 434 U.S. 257, 264 (1978). Otherwise, a second, third, or fourth Rule 59 Motion could be served and filed after judgment is entered and the first pre-judgment motion had been denied. Must each such motion be addressed, so long as they were served within ten days of entry of judgment? Does the time for appeal run only from the denial of the last such filed motion or from the denial of the second such filed motion? *See, e.g., Dixie Sand & Gravel v. Tennessee Valley Authority*, 631 F.2d 73, 75 (5th Cir. 1980); 9 MOORE'S FEDERAL PRACTICE ¶ 204.12[1] at page 4-95, n.63 (noting that the theoretical ability to delay and postpone the time for appeal is one of the reasons why only the first such motion is considered effective to delay the judgment's finality and time for appeal).

Simply put, the "bright line" rule is that one timely served and filed motion under Rule 59 and its denial triggers the timetable for appeal under Rule 4, Fed. R. App. P. If that motion is served and filed pre-judgment and denied, the entry of judgment (or date of denial, if later) sets the time for appeal. This result is certain, and it advances the Rule's goals of finality and certainty.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

MILFORD C. HORTON,

Petitioner,

v.

MONROE SYSTEMS FOR BUSINESS, INC., GERALD NEUMANN, MARVIN PASTOR, GERALD TULLY, MICHAEL GARDNER, HAROLD SHORT, and JOHN MISKEW,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

The respondents' suggested reasons for denying the writ are:

- the conflict must not be important since the Fifth Circuit is right and the Seventh Circuit is "clearly wrong" (Brief in Opp. at 4)
- to the extent that the Court reserved the issue in *United States v. Ibarra*, 112 S. Ct. 4 (1991), the issue must not matter because "the two motion issue was expressly noted by the Court in *Ibarra* as not being before it." (Brief in Opp. at 3)
- the Seventh Circuit's position "is out of step with the other cases cited." (Brief in Opp. at 5)
- "the analysis of the Seventh Circuit does not square with the history, purpose, and wording" of the rules (Brief in Opp. at 1).

These are not reasons for certiorari to be denied. They are reasons for certiorari to be granted.

Respondents' view of the merits – that Judges Easterbrook and Posner know nothing about federal jurisdiction, and that they are not up to the job of providing "analysis or reasoning" (Brief in Opp. at 4) – is without support. But respondents' view of the merits is beside the point. The point is that respondents have not made a single valid argument for denying the writ.

The driving question at the petition stage is not which circuit is right. The driving question is whether the Fifth Circuit's refusal to write a full opinion means that

the conflict is out of this Court's reach. The answer is no, and here is why.

The issue presented here is relevant to nearly every appeal in the federal system. It is an issue of subject matter jurisdiction. Its jurisprudential importance is undeniable. Only this Court can furnish a uniform nationwide rule.

To be sure, this Court does not sit simply to correct errors. And it is true that a court of appeals can usually evade this Court's oversight by disposing of a case summarily. But this Court always retains supervisory power over the federal judicial system. Sup. Ct. R. 10.1(a). Certiorari practice must not "risk effectively immunizing summary dispositions by Courts of Appeals" from review, "since it is rare that their basis for decision is entirely unambiguous." *Stutson v. United States*, ___ U.S. ___, ___ (Jan. 8, 1996); *see also Lawrence v. Chater*, ___ U.S. ___, ___ (Jan. 8, 1996) ("the prevalence of summary dispositions by the Courts of Appeals continues to increase with the burgeoning federal docket.").

Here, the "basis for decision" *is* "entirely unambiguous." The decision was not an affirmance but a *dismissal*. Respondents moved for dismissal on only one ground. The court of appeals granted that motion. On petition for rehearing, the court of appeals took the unusual step of asking for a response. All of the papers so far have dealt with the single narrow issue that is presented here. There is no doubt about what the court of appeals did. When a court of appeals summarily dismisses a case on ***jurisdictional grounds,*** this Court's supervisory power should come into play.

We do not lightly refer to the Court's supervisory power as a basis for review, for we know that this power is reserved for rare cases. We would have preferred for the court of appeals to issue a full opinion. Then the inter-circuit conflict would have been more open and obvious, and analyzing the conflict for its cert-worthiness under the traditional criteria would have been easier. But supervision is called for on occasion. This is one of those occasions.

CONCLUSION

The petition should be granted. Alternatively, the Court should use its power under 28 U.S.C. § 2106 to vacate and remand for "such further proceedings to be had as may be just under the circumstances."

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